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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GERARDO BROWN ROBLES, JR. et al.,<br><br>Defendants and Appellants. | D051344 (Consolidated with D051421)<br><br>(Super. Ct. No. JCF18759 & JCF18784) |

APPEAL from judgments of the Superior Court of Imperial County, Jeffrey B. Jones and Juan Ulloa, Judges. Affirmed in part and reversed in part with directions.

After a consolidated trial, a jury convicted Gerardo Brown Robles, Jr. and Samuel Raymond Gudino of home invasion robbery in concert (Pen. Code,[1] §§ 211 & 213, subd. (a)(1)(A); count 1), carjacking (§ 215, subd. (a); count 2), three counts of assault with a

1 All statutory references are to the Penal Code unless otherwise specified.

firearm (§ 245, subd. (a)(2); counts 3, 4 & 5), and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 6).

In a bifurcated proceeding, the trial court found true that Robles had suffered a prior serious felony conviction, which constituted both a serious felony under section 667, subdivision (a)(1) and a strike prior (§§ 667, subds. (b)-(i), 1170.12), and that he had served a prior prison term based on that and another prior conviction (§ 667.5, subd. (b)). The court sentenced Robles to a total of 33 years, eight months in prison and Gudino to a total prison term of 20 years, eight months. Each defendant has separately appealed.

Robles contends there was insufficient evidence to sustain his convictions for assault with a firearm, the trial court prejudicially erred in instructing the jury on great bodily injury as part of the assault with a firearm instruction and in failing to instruct the jury on aiding and abetting, the court erred in permitting him to be convicted of both carjacking and receiving the same property, and the court committed numerous sentencing errors, which require remand for resentencing and recalculation of presentence behavioral custody credits.

Gudino claims the trial court committed prejudicial error by granting the prosecutor's motion to consolidate his trial with that of Robles's, the evidence was insufficient to sustain his carjacking conviction and two of the assault with a firearm convictions, the court erred in failing to instruct on the personal use of a firearm for the counts 3, 4 and 5 enhancements, and the court committed numerous sentencing errors, which require remand for resentencing and recalculation of presentence behavioral custody credits.

The People concede that the trial court committed serious sentencing errors as to both Robles and Gudino, which require the matter be remanded for resentencing, but argue their claims challenging their convictions are without merit. We disagree in part.

Although we find that the trial court did not abuse its discretion in initially granting the prosecutor's objected-to motion to consolidate the trials for Robles and Gudino, we conclude on this record that the conceded *Aranda-Bruton*[2] error was not harmless beyond a reasonable doubt and resulted in gross unfairness to Gudino. We therefore reverse Gudino's judgment in its entirety.

As for Robles, we find the trial court's failure to instruct the jury on aiding and abetting was prejudicial with regard to the three counts of assault with a firearm and it erred in permitting Robles to be convicted of both unlawful driving or taking of a vehicle and receiving a stolen motor vehicle. We therefore reverse Robles's convictions on counts 3, 4, 5 and 7. In all other respects, we affirm Robles's convictions (counts 1, 2 & 6) and remand the matter for resentencing with directions.

## FACTUAL BACKGROUND

On October 1, 2006, at around 11:10 p.m., as Jasmine Garcia, her two-year-old daughter, and her boyfriend, Rogelio Olmos, returned to Garcia's house in Calexico, California to gather some clothes before going to Garcia's grandmother's home to spend the night, four armed and partially masked men entered the house asking for money and

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2 *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

jewelry and eventually demanded the keys to Olmos's car, a red Volkswagen Jetta. The men were in the house for approximately 45 minutes before taking Olmos's wallet and car keys and driving off in Olmos's Jetta.

Calexico police officers responded to the scene and conducted an investigation, including dusting for latent fingerprints, photographing footprints in the backyard area and interviewing Olmos and Garcia. Garcia indicated that all four intruders wore bandanas and had shaved heads. Olmos said one of the men hit him on the back of his head with what he thought was a gun, which caused a laceration, and another man pushed and kicked him in the head during the incident. Olmos explained that he would not be able to identify two of the men but could possibly identify the other two because he had seen their eyes. Olmos also heard one of the suspects, who was wearing a hat, talking on a cell phone. The man Olmos saw holding a revolver had a small tattoo on his right hand between his thumb and index finger.

The next day, at around 11:00 a.m., an El Centro police officer spotted the described Jetta in El Centro, California and pulled over and arrested Robles who was driving the car and had a set of car keys in his front pants pocket. Robles said he was borrowing the car from a friend named Carlos. In a subsequent interview, Robles refused to identify the friend, saying he "couldn't tell on his friend." His shoes were taken to compare with the footprints found outside Garcia's house.

During the investigation of the home invasion, Calexico Police Detective Erik Longoria interviewed Garcia and Olmos again. Each separately identified Robles in a six-pack photographic lineup they were shown as the intruder with a hat who had been

talking on a cell phone during the incident supervising the other men. During her interview, Garcia asked Longoria if any of the other intruders was named "Sam," because she remembered the man with the cell phone asked several times "where's Sam" during the incident and then said, "Sam, let's get out of here. There's nothing here." Because of this exchange, Longoria looked through some files and discovered that Sammy Raymond Gudino was an associate of Robles. Longoria then obtained a photograph of Gudino and prepared another six-pack photographic lineup to show Garcia and Olmos.

Olmos immediately identified Gudino as the person who had the gun and hit him over the head during the home invasion incident, saying "that's him." Garcia initially picked out two photos, stating she was not positive, and then stated that "one of the subjects, the tall thin subject, looked like Number 3, which was Mr. Gudino, but stated that she was not positive." Gudino was subsequently arrested and charged in this case. Shortly before trial, the court granted the prosecution's motion to consolidate Robles's and Gudino's cases.

In addition to the above evidence being presented at the consolidated trial, Garcia testified that when she had arrived home with Olmos and her daughter the night in question, she went to pull out some clothes from a hall closet while Olmos took her daughter to the bathroom. As she was taking some clothes from the closet, two men rushed toward her, one pointing a gun at her and telling her not to move and the other holding a knife. Garcia said one of the men was tall, bald, and wore a black shirt and shorts, and the other wore a bandana on his face. As one of the men pushed her into her bedroom, she saw one of the men push Olmos to the ground and heard her daughter start

crying and screaming. When Garcia asked for her baby, one of the men let her go into the bathroom to retrieve her child and take her back into the bedroom. As she did so, Garcia saw another man with Olmos and two others in the house, one standing at the door wearing a khaki shirt and pants and a hat. Garcia identified Robles in court as the person in the hat and said that he never approached her during the incident. She could not identify Gudino in court as being one of the intruders.

From the bedroom, Garcia heard the men in the house looking for money and jewelry for about 45 minutes and heard Robles talking on a cell phone as he walked through the house, saying to someone, things like, "[n]o, there's nothing," "no there's just a girl . . . with her baby," "they don't have nothing," "they say they don't have money, nothing," and "no there's nothing Pancho, they don't have nothing." As the robbers left the house, Garcia heard Robles say, "let's go, let's go Sammy, let's go." Garcia said she lost a cell phone and her purse with $1,200 in it, which she had left in the car, when the robbers took Olmos's Jetta.

Under further questioning, Garcia stated that she did not see anyone point a gun at her daughter during the incident. She also noted that although one of the two men who originally approached her had pointed a gun at her, Robles had not done so and she denied having told any police officer that he had a gun. Garcia also denied ever seeing Robles before that night or that he had ever been to her house.

Olmos testified similarly to Garcia about being hit and pushed to the floor by two of the intruders while he stood at the bathroom door waiting for Garcia's daughter. He identified Gudino in court as the man he believed hit him over the head with a gun and

caused a laceration which required several staples to close. Although Gudino, who had a shaved head, was wearing a bandana over his mouth at the time, Olmos was 95 percent sure that Gudino was the man who kept a gun pointed at him during the incident because of his big eyes and eyebrows.

Olmos said that at some point during the incident, Robles, whom he also identified at trial as one of the robbers and who appeared to be in command, asked him where the money was. When Olmos indicated he did not know, Robles kicked him in the head. Olmos testified that during the next 45 minutes to an hour, Gudino kept a gun pointed at him while Robles and the other two men searched the house for money and jewelry and Robles continually talked to the others via his cell phone. Finally, when the intruders' efforts proved fruitless, they demanded Olmos's car keys and took his wallet and two cell phones from his pants' pockets. Although Olmos refused to tell the robbers where his car keys were, they eventually found them on the bathroom floor near where he had initially been pushed to the ground. Olmos then saw a couple of men go out the door, heard his car start and someone say, "Sammy, let's go. Sammy, let's go." He next heard the robbers speed away with his car.

On cross-examination, Olmos conceded that although he had originally told the police that he saw three guns, he only saw one gun, the one pointed at him by Gudino. Although he saw two of the men push Garcia into a bedroom during the incident, he never saw anyone point a gun at her. Olmos clarified that two or three of the intruders, including Gudino, were wearing a bandana during the home invasion; he had originally

stated that only Gudino's face was covered. Olmos viewed Gudino's hands and admitted he had no tattoos on them as he had originally told the investigators the gunman had.

The parties stipulated that the procedures used to obtain and test the latent fingerprints and the footprints found at the scene of the alleged crimes were proper and that there were no errors in the transfer or delivery of the evidence. The footprints found at the crime scene were determined to be similar to the shoes that Robles was wearing when he was arrested. The latent print evidence taken from the outside the back door area of Garcia's house matched a known fingerprint of Gudino's and palm prints from both Gudino and Robles. No latent prints found on the inside of the house matched either defendant.

*The Defense*

Gudino rested, relying on the state of the evidence.

Robles called several witnesses in his defense. A friend of both defendants testified that they had been with him in El Centro watching football on the day of the crimes until around 6:30 or 7:00 p.m. when he drove them to Calexico and dropped them off at a house. A Calexico police officer, who had showed both Garcia and Olmos one of the photographic lineups, testified that both separately chose Robles, who did not have a shaved head, as the person who had been on a cell phone during the home invasion. Robles's aunt testified that she had only seen Robles with his hair shaved off once about three years earlier to show off a tattoo he had on his head. She did not know how long he has had the tattoo because his hair always covers it. Counsel had Robles stand before the jury to view his "physique and his visage," as well as his hands and fingers.

In closing, Gudino's counsel essentially argued that Gudino was not one of the robbers the night in question. He asserted that Olmos's identification of Gudino as one of the robbers and the person with the gun was suspect because Gudino did not have any tattoos on his hands as the purported gunman was supposed to have, the robber with the gun had on a bandana covering most of his face, Garcia could not identify Gudino in court as one of the robbers, and the only tie to his identity was from "a hearsay jamboree" of statements used for their truth without any limiting instructions. Counsel pointed out that Garcia did not even come up with the statements regarding "[w]here's Sam" and "[l]et's go Sammy" until the second time she talked with the investigators, and she was unclear in court whether she had even said the exact words the investigator wrote down regarding someone named Sammy. Although counsel conceded that there was one fingerprint of Gudino found outside Garcia's home, he argued such was insufficient to prove he had gone inside the house and was consistent with Gudino going to the home earlier with Robles, knocking on the door, and then leaving when they found that no one was home.

Robles's counsel argued in closing that the whole incident was a fabrication. He pointed out the numerous inconsistencies in Garcia's and Olmos's testimony regarding the identities of the robbers with what they had initially told the responding officers together and then subsequently had told the investigators in separate follow up interviews. Counsel argued that the evidence did not add up and that Garcia and Olmos were hiding the true facts based on some preexisting relationship between Garcia and Robles. Counsel noted that neither Garcia nor Olmos had given any descriptions of the other

purported intruders and asked the jury to carefully consider Garcia's demeanor when she testified, particularly about how "flighty" she had become when she was asked whether she had met Robles before or ever had dinner with him in Calexico. Counsel also explained the finding of the finger and palm prints and foot print outside of Garcia's house as part of that preexisting relationship. Alternatively, Robles's counsel argued that at most Robles might be guilty of the count 6 vehicle theft for exceeding his permission, with which the evidence was consistent, to drive the Jetta.

The jury rejected Gudino's and Robles's various arguments and found them guilty of all counts and enhancements respectively charged.

## DISCUSSION

### I

### *GUDINO'S APPEAL*

As noted above, Gudino has timely appealed, contending the trial court prejudicially erred by consolidating his trial with that of Robles, there was insufficient evidence to support his carjacking and two of his assault with a firearm convictions, the court committed fatal instructional error with regard to the counts 3, 4 and 5 firearm enhancements, and the court committed numerous sentencing errors. As we explain, although we find sufficient evidence to support his carjacking and challenged assault convictions, we reverse the judgment in its entirety as to Gudino because on this record and in light of the People's concession there was *Aranda-Bruton* error in the admission of codefendant Robles's statements regarding "Sammy," we cannot say that the error in such

admissions was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).)

*A. Consolidation of Gudino's and Robles's Trials*

During a trial and readiness hearing, the prosecutor brought a motion to join Gudino's and Robles's for jury trial. After trailing the matter to read the recently filed motion by the prosecutor, the court first heard from Gudino's counsel who opposed the motion, complaining about its lateness and the need to have more time to prepare for a joint trial. Although counsel acknowledged there was a preference for joint trials, he argued because of separate preliminary hearings, arraignments on different informations, and the fact it was the last day before trial for Gudino, the motion should be denied. Robles's counsel conceded that legal authority favored joinder in this case, and stated that Robles did not object to joinder and was willing to waive time for Gudino's counsel to prepare for a joint trial.

The prosecutor clarified that although the motion was late, all parties had notice of his intention to bring the motion to join the two trials together, which would not necessitate any change to the pleadings and thus could not come as an "unfair advantage or an unfair surprise."

When the court then inquired whether there were any *Aranda* or *Bruton* issues that might effect the decision to join the cases for trial, Gudino's counsel replied, "Judge, I don't think so, but I suggest that the question be put to the prosecutor [as to whether] he intend[s] to offer any statements [of] either defendant -- either Mr. Robles or Mr.

Gudino." The prosecutor represented that he could not recall the defendants making any such statements and did not anticipate any *Aranda* problems.

After noting that it considered the *Aranda-Bruton* issue a very important factor in the determination whether to join or have separate trials, the court stated it was going to grant the motion to consolidate under section 1098 because the defendants were charged with the same offenses in separate pleadings that related to "a single transaction or event." After taking time waivers from each defendant, the matter was put over to either set a trial date or for disposition.

At the trial, which commenced several months later before a different judge than heard the consolidation motion, the prosecutor elicited from Garcia that as Robles left her home, she overheard him say, "let's go, let's go Sammy, let's go." Olmos agreed in his testimony that he had heard someone say "Sammy, let's go, Sammy let's go" as the intruders left Garcia's home in his Jetta. Detective Longoria testified that when he had interviewed Robles after his arrest, he said he had borrowed the car from a friend but refused to identify him because he did not want to "tell on his friend."

Longoria also explained to the jury that because Garcia and Olmos had mentioned the statements made by Robles regarding someone named "Sammy" during interviews with them, including "where's Sam," and "Sam, let's get out of here. There's nothing here," he had searched some files for Robles's associates to locate Gudino and had included his photograph in a six-pack lineup he then showed to Garcia and Olmos. Although Garcia was not positive about her identification of Gudino in that lineup as one of the intruders, Olmos had immediately identified Gudino as the man who had the gun

during the incident. Neither Garcia nor Olmos had mentioned to the initial police officers responding to the crime scene that they had heard Robles or any other intruder make any statements regarding someone named "Sammy."

Although Garcia, Olmos and Longoria were all cross-examined about the various "Sammy" statements purportedly made by Robles during the incident, Robles did not testify at trial. During a break near the close of the prosecution case, Gudino's counsel brought a motion to exclude as hearsay all the evidence of Garcia's statements made to Longoria regarding her identification of Gudino in the photographic lineup and the out-of-court statements of Robles that were used to prove Gudino's identity because such was not admissible without the prosecutor stating grounds for their admission. The court overruled the objection as not timely. The court subsequently denied counsel's new trial motion brought in part on the erroneous admission of the hearsay statements by Garcia and Longoria.

On appeal, Gudino contends that the trial court erred in consolidating his and Robles's trials, arguing such consolidation resulted in a violation of his constitutional rights to confront and cross-examine witnesses against him, led to the admission of inadmissible hearsay, and violated his due process rights by running afoul of *Aranda-Bruton*, which prohibits the admission of incriminating statements by a nontestifying codefendant (*Bruton, supra*, 391 U.S. at pp. 127-128, 135-137; *Aranda, supra*, 63 Cal.2d at pp. 530-531). Alternatively, Gudino claims his trial counsel's failure to perfect the record by failing to object to the admission of codefendant Robles's out-of-court

statements during the robbery and at the time of his arrest to Detective Longoria constituted ineffective assistance of counsel.

The People contend that the trial court did not abuse its discretion in granting the motion to consolidate Robles's and Gudino's trials and that Gudino cannot establish any prejudice due to conceded *Aranda-Bruton* error. Although the People agree that Robles's statements regarding "Sammy" that were admitted at trial implicated Gudino's presence at the crime scene and should have been excluded, they argue their erroneous admission was harmless beyond a reasonable doubt.[3] (*Chapman, supra*, 386 U.S. 18; *People v. Anderson* (1987) 43 Cal.3d 1104, 1128.) We agree the court did not abuse its discretion in granting the consolidation motion, but conclude that the joinder in this case, coupled with Gudino's counsel's ineffectiveness in timely raising the *Aranda-Bruton* issue, " 'resulted in "gross unfairness" amounting to a denial of due process.' " (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

*1. Applicable Law*

Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Joint trials are preferred because "they 'promote economy and efficiency' and ' "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." ' [Citation.] When defendants are charged

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[3] The People do not claim that the issue is waived by the lack of any timely objection below or address Gudino's alternative argument that his counsel was ineffective for failing to so object.

with having committed 'common crimes involving common events and victims,' as here, the court is presented with a 'classic case' for a joint trial. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 (*Coffman and Marlow*).)

Nonetheless, at the discretion of the trial court, this legislative preference for joint trials, may be set aside and separate trials ordered "if, among other reasons, there is an incriminating confession [or statements] by one defendant that implicates a codefendant, or if the defendants will present conflicting defenses. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452 (*Lewis*).) Severance may also be appropriate when " 'there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' [Citations.]" (*Ibid*.)

We review the ruling on a consolidation motion "for abuse of discretion based on the facts as they appeared when the court ruled on the motion. [Citation.]" (*Lewis, supra*, 43 Cal.4th at p. 452.) If there is an abuse of discretion, reversal is only required "if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. [Citations.]" (*Ibid*.) However, if the consolidation ruling was proper when it was made, "we may reverse a judgment only on a showing that joinder ' "resulted in 'gross unfairness' amounting to a denial of due process." ' [Citation.]" (*Ibid*.)

With regard to *Aranda-Bruton*, our Supreme Court in *Lewis, supra*, 43 Cal.4th 415, recently set out in detail the governing law regarding such claims. (*Id*. at pp. 453-455.) Essentially, it noted that the *Aranda-Bruton* rule had evolved to hold that " 'the

Confrontation Clause [which ensures a defendant's Sixth Amendment right to be confronted with the witnesses against him and includes the right of cross-examination] is not violated by the admission of a nontestifying codefendant's confession [or incriminating extrajudicial statements] with a proper limiting instruction when . . . the confession [or statements are] redacted to eliminate not only the defendant's name, *but any reference to his or her existence*.' [Citation.]" (*Lewis, supra*, 43 Cal.4th at p. 454; original italics.) Moreover, "[w]hen, despite redaction, the statement 'obviously refer[s] directly to someone, often obviously the defendant, and . . . *involve[s] inferences that a jury ordinarily could make immediately, even were the confession [or statements] the very first item introduced at trial*' [citation], the [*Aranda-]Bruton* rule applied and introduction of the statement at a joint trial violate[s] the defendant's rights under the confrontation clause. [Citation.]" (*Lewis, supra*, 43 Cal.4th at p. 455, original italics.)

Where a violation of the *Aranda-Bruton* rule is found, or conceded as in this case, the erroneous admission into evidence of a codefendant's statements will require reversal unless it is shown not to be prejudicial beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) "The United States Supreme explained the *Chapman* test as follows: 'Harmless-error review looks . . . to the basis on which "the jury *actually rested* its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support the verdict might be--would violate the

jury-trial guarantee. [Citations.]' [Citation.]" (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1399-1400; original italics.)

Moreover, with regard to Gudino's alternative assertion, that he was denied the effective assistance of counsel with regard to the admission of codefendant Robles's out-of-court statements, we note that "[t]o secure reversal of a conviction upon [such] ground . . . under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

Moreover, "[i]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

*2. Analysis*

Here, at the time of the prosecutor's motion to consolidate, the court was faced with separate accusatory pleadings filed against Robles and Gudino that alleged the same or similar crimes arising out of the same operative facts and involving the same victims. Thus this was the classic example of cases that should be joined for trial. (See *Coffman*

*and Marlow, supra*, 34 Cal.4th at p. 40.) After the prosecutor responded to the court's questioning that he did not know of any *Aranda-Bruton* problem or statements of either defendant that would be admitted at trial, the court granted the motion to consolidate. On the information before the court at the time of its ruling, we conclude the trial court was well within its discretion to grant consolidation of Robles's and Gudino's cases for trial.

Although we find no abuse of discretion, "[b]ecause the issue is raised on appeal following trial [and Gudino asserts he was denied a fair trial by the grant of the prosecution's motion for joinder of his trial with that of Robles], we must also consider whether, 'despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive [Gudino] of a fair trial or due process of law.' [Citation.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 174.)

In this regard, the record reflects that at the beginning of trial two months after the cases were consolidated, the prosecutor in opening statements told the jury that he would be presenting evidence that Robles had addressed one of the other intruders as "Sammy," which was overheard by Garcia and such fact would become important because "that's the name of Mr. Gudino." From that time until the end of the prosecution case, Robles's out-of-court statements referencing "Sammy" made during the incident were elicited through the testimony of Garcia, Olmos and Longoria to essentially prove the identity of Samuel Gudino as an associate of Robles and one of the robbers. The People concede on appeal that the statements, "where's Sam" and "let's go Sammy," violated Gudino's Sixth Amendment right to confront and cross-examine a witness, Robles, whose out-of-court

statements implicated him as a person present at the crime scene and should have been excluded as violative of the *Aranda-Bruton* rule.

Contrary to the People's position that the admission of those statements was harmless on this record, we find that they were prejudicial under *Chapman*. Robles's statements made during the home invasion robbery, clearly reinforced Olmos's identification of Gudino as the "Sammy" involved in the incident. Because the man with a gun that Olmos identified as Gudino had a bandana covering most of his face and Garcia could not identify Gudino as one of the intruders in court, even though Gudino's fingerprint was found outside the house, we cannot say beyond a reasonable doubt that the out-of-court statements by Robles regarding someone named Sammy did not contribute to the jury's verdicts finding Gudino guilty of all charges in this case. (See *People v. Song* (2004) 124 Cal.App.4th 973, 984-985.)

Moreover, because Gudino's trial counsel admitted on the record near the end of trial that he had made a mistake for failing to timely object to Roble's statements, especially after originally expressing concerns when he objected to the original consolidation motion about whether the prosecutor intended to introduce any statements by Robles in a joint trial, we also cannot say that Gudino received the effective assistance of counsel in this regard.[4] On this record, the cumulative effect of such ineffectiveness

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4 We believe that any reasonable attorney would have raised objections at the start of trial to exclude any and all statements by Robles that violated *Aranda-Bruton* and would not have emphasized those statements by cross-examining the witnesses about them. Moreover, where, as here, the facts reveal conflicting or weak identification

coupled with the overall unfairness of prejudicial error by the conceded *Aranda-Bruton* errors, completely undermined Gudino's constitutional right to a fair trial. (*People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Accordingly, we reverse the judgment against Gudino.

In light of our resolution of Gudino's appeal, his remaining issues technically are moot and need not be discussed. However, because he raises the sufficiency of the evidence as to his convictions for carjacking (count 2) and the assaults against Garcia and her daughter (counts 4 & 5) which theoretically could preclude retrial if meritorious, we address those issues at this time.[5] As we explain, there was sufficient evidence to support Gudino's counts 2, 4 and 5 convictions.

*B. Sufficiency of the Evidence*

Because Gudino contends there was insufficient evidence to support the element of taking from the "person or immediate presence" for his carjacking conviction, and to support his assault convictions against Garcia and her daughter, we have reviewed the facts adduced at trial in full and in the light most favorable to finding those elements, drawing all inferences in support of such findings. (*People v. Silva* (1988) 45 Cal.3d 604,

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evidence to tie Gudino to the charged crimes, we cannot say we have confidence in the outcome of the trial. (See *Williams v. Taylor* (2000) 529 U.S. 362, 391.)

[5] The United States Supreme Court "has consistently held that the Double Jeopardy Clause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of the insufficiency of the evidence." (*Oregon v. Kennedy* (1982) 456 U.S. 667, 676, fn. 6.)

625; *People v. Johnson* (1980) 26 Cal.3d 557, 576 (*Johnson*).) We resolve his challenges based upon the entire record and determine whether there is substantial direct or circumstantial evidence of the existence of each of those elements which the jury necessarily found in support of the convictions. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *Johnson, supra*, 26 Cal.3d at p. 577.) The test is not whether the evidence proves guilt beyond a reasonable doubt, but whether substantial evidence, of credible and solid value, supports the jury's conclusion. (*People v. Arcega* (1982) 32 Cal.3d 504, 518; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 996.)

In making our determination, we do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. (Evid. Code, § 312.) We simply consider whether " ' "*any* rational trier of fact could have found the essential elements [of each conviction challenged] beyond a reasonable doubt." ' [Citations.]" (*People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Unless it is clearly shown that "on no hypothesis whatever is there sufficient substantial evidence to support the [jury's verdicts]," we will not reverse. (*People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

With these rules in mind, we address each of Gudino's challenged convictions in turn.

*1. Count 2: Carjacking*

Gudino was convicted of carjacking in count 2, which is the "felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence,

or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).) Gudino claims the evidence was insufficient to support the element that he took the Jetta from the person or immediate presence of Olmos. We disagree.

Similar to the situation in *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), where the "immediate presence" element of carjacking was found to be satisfied because the defendant had used force or fear to dispossess the car owner of her car keys inside a business when her car was in an outside location (*id*. at pp. 608-609), Gudino with a gun pointed at Olmos, along with Robles and the other intruders, demanded Olmos's car keys to the Jetta. Although Olmos, the owner of the Jetta, originally refused to tell the intruders where his keys were, which had fallen on the ground when he was originally knocked to the floor by Gudino from behind, the assailants soon found them and took off in the Jetta parked in the driveway right outside the house's garage. The jury was instructed under CALCRIM No. 1650 that "[a] vehicle is within a person's immediate presence if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear." On this evidence and the instructions given, the jury could have reasonably found that Gudino took possession of Olmos's car by threatening him and demanding his car keys at gun point while Olmos was within close enough proximity of his car in the driveway of Garcia's house that but for the forcible taking of his car keys he would have kept possession of it.

Contrary to Gudino's arguments otherwise, the victim of a carjacking need not actually be physically present in the vehicle or within a certain distance from the vehicle when the taking occurs to show "immediate presence." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131; *People v. Medina* (1995) 39 Cal.App.4th 643, 650-651.)

Additionally, Gudino's reliance on *People v. Coleman* (2007) 146 Cal.App.4th 1363, which criticized the holding in *Hoard* regarding the construction of the "immediate presence" element for carjacking, is misplaced. *Coleman* is factually distinguishable from both *Hoard* and this case. In *Coleman*, the defendant entered a store and demanded the keys to a car that did not belong to the employee accosted and there was absolutely no evidence that that employee had any other possessory interest in the car taken. (*Coleman, supra*, 146 Cal.App.4th at p. 1366.) In both *Hoard* and in this case, the person from whom the car keys were forcibly taken, had a possessory interest in the nearby car, either being the owner of the keys to the car or a person who had been or would be the driver or passenger of the car. (See *Coleman, supra*, at p. 1373; *Hoard, supra*, 103 Cal.App.4th at pp. 602, 608.)

Because we agree with the reasoning in *Hoard*, *supra*, 103 Cal.App.4th 599, and the facts here were such that the jury could reasonably find that Gudino exerted force and fear on Olmos who was the owner and driver of the Jetta to take his keys to the car while it was nearby, the "immediate presence" element for carjacking was sufficiently satisfied. Substantial evidence supports Gudino's count 2 conviction.

*2. The Assaults with a Firearm in Counts 4 and 5*

Gudino was convicted of assault with a firearm against Garcia in count 4 and against Garcia's minor daughter in count 5. The jury was instructed under CALCRIM No. 875 that in order to find Gudino guilty of such crimes, "the People must prove that: [¶] 1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] AND [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm." The jury was also told that such crimes could be committed without Gudino "intend[ing] to break the law, hurt someone, or gain any advantage," without Gudino "actually touch[ing] someone," and without Gudino "actually intend[ing] to use force against someone when he acted."

Case law has explained that assault with a firearm, like simple assault, is a general intent crime that can be committed "without making actual physical contact with the . . . victim; because the statute focuses on use of a deadly weapon or instrument or alternatively, on force likely to produce great bodily injury, whether the victim in fact suffers any harm is immaterial." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; see *People v. Colantuono* (1994) 7 Cal.4th 206, 214-215 (*Colantuono*).) Because the gravamen of the crime of assault with a firearm is the defendant's act and not his intent in committing that act, a defendant need not even point a weapon at the victim to constitute an assault, but only needs to hold the weapon in such a way as to effectively use it. (See

*People v. McMakin* (1957) 8 Cal. 547; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263 (*Raviart*).) All that is necessary is an "act [that] by its nature [would] probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

For example, in *Raviart*, where the defendant pointed a gun at only one of the two officers who apprehended him, the court found that "[b]y drawing the gun with the intent to shoot the officers, defendant performed an overt act sufficient to constitute an assault on both of them. Defendant did not have to perform the further act of actually pointing the gun directly at [the other officer] to be guilty of assaulting [him]. It was enough that defendant brought the gun into a position where he could have used it against [the other officer] if the officers had not shot him first." (*Raviart, supra*, 93 Cal.App.4th at p. 266.)

In other words, it is not necessary for the defendant to harbor a specific intent to harm a particular person to be guilty of assaulting that person, but only needs to have intentionally placed himself in a position "and equipped himself with sufficient means that he appears to be able to strike" the person. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 112.) Thus, the fact that the defendant in *People v. Tran* (1996) 47 Cal.App.4th 253 (*Tran*) did not intend to harm the baby a man was holding when the defendant chased the man with a knife was found to be irrelevant to finding that the "defendant's act of chasing [the man] and the baby and threatening them with a long knife demonstrates a willful attempt to use physical force against the victims he was pursuing. . . . [¶] . . . [¶] . . . It is not reasonable to insist that defendant desired only to injure the [man], and thus was not

liable for an assault on the [baby]. Surely a knife attack on the [man] could foreseeably have wounded the baby." (*Id*. at pp. 261-262.)

Gudino claims that the evidence was insufficient to convict him of assaulting Garcia and her daughter because there is no evidence he ever pointed a gun at either alleged victim or in their direction or did any act "that by its nature [would] probably and directly result in injury to another." (*Colantuono, supra*, 7 Cal.4th at pp. 214-215.) We disagree.

As to Garcia, she testified that one of the intruders pointed a gun at her. Although she was unable to identify Gudino at trial as the gunman or one of the intruders, Olmos had identified Gudino as the only intruder with a gun. The jury could have reasonably inferred from this evidence that Gudino was the person who pointed the gun at Garcia before he then attacked Olmos in the bathroom with the weapon. Substantial evidence thus supports the jury's verdict that Gudino assaulted Garcia with a firearm.

As to Garcia's child, although there was no evidence that Gudino pointed the gun directly at the child in the bathroom where she was taken by Olmos, there was evidence that Olmos was in close proximity of the child in the bathroom when Gudino attacked Olmos from behind, hitting him with the gun, which caused him to fall to the floor and the child began to cry and scream. By his actions in attacking Olmos with the gun in Garcia's daughter's immediate presence, a jury could have reasonably inferred that Gudino had created a situation where he was armed and posed a serious risk of harm to Garcia's daughter similar to that in *Tran, supra,* 47 Cal.App.4th at pages 261 to 262.

Consequently, there was substantial evidence in the record to also support the jury's verdict that Gudino assaulted Garcia's daughter with the firearm.

To reiterate, although we have found sufficient evidence supports Gudino's convictions in counts 2, 4 and 5, the entire judgment against him is reversed in light of prejudicial *Aranda-Bruton* error coupled with ineffectiveness of counsel which undermined the fairness of his consolidated trial with Robles.

II

*ROBLES'S APPEAL*

As noted earlier, Robles claims the evidence was insufficient to sustain his three assault with a firearm convictions because there was no evidence he had a gun during the crimes, the trial court prejudicially erred in instructing the jury on great bodily injury as part of the assault with a firearm instruction and in failing to instruct the jury on aiding and abetting with regard to the robbery in concert charge, the court erred as a matter of law in permitting him to be convicted of both carjacking and receiving the same property, and the court committed numerous sentencing errors, which require remand for resentencing and recalculation of presentence behavioral custody credits.

Preliminarily, we make several observations. First, even though the prosecutor essentially presented a theory that Robles was the major actor or participant in the home invasion robbery, continually communicating with the other participants via his cell phone, and committing the crimes of robbery and carjacking "in concert" with the other participants, it also appears the prosecutor relied on an aiding and abetting theory for Robles's liability for the three assault with a firearm crimes. Although they concede the

trial court erred in failing to instruct the jury on "aiding and abetting" with regard to the "in concert" instructions and further acknowledge it was error for the court not to instruct under the aiding and abetting theory of culpability for the three counts of firearm assault, they point out that Robles only makes his aiding and abetting instructional error claim with regard to the "in concert" enhancement for the count 1 robbery. Nevertheless, because the People have responded to his arguments with regard to the firearm assault counts as well as arguing there was sufficient evidence to support the jury's verdicts on those counts because Robles was guilty under an aiding and abetting theory, in the interests of justice and fairness we treat Robles's instructional error claim regarding aiding and abetting as also pertaining to the assault counts. Consequently, we will address the instructional errors together with the sufficiency of the evidence below.

Secondly, the People concede the sentencing in this case was misguided and must be remanded for resentencing, and ask this court to reinstate Robles's count 6 conviction for unlawful taking or driving of a vehicle and instead strike his count 7 conviction for receiving a stolen vehicle. Because our Supreme Court in *People v. Montoya* (2001) 33 Cal.4th 1031, 1034-1036, found that the unlawful taking of a vehicle under Vehicle Code section 10851, subdivision (a) is not a lesser included offense of carjacking, the trial court's striking of Robles's count 6 conviction was erroneous as a matter of law and we reinstate the conviction. (§ 1260.) Moreover, because one cannot be convicted of both stealing and receiving the same property (§ 496, subd. (a); *People v. Allen* (1999) 21 Cal.4th 846, 851-853; *People v. Donnell* (1975) 52 Cal.App.3d 762, 768-769), Robles's count 7 conviction for receiving the stolen car for which he was also convicted of taking

or driving in count 6, must be reversed. (*People v. Stephens* (1990) 218 Cal.App.3d 575, 586-587.) Roble's assertion that the court erred as a matter of law in permitting him to be convicted of both carjacking and receiving the same property is therefore moot. On remand, the trial court should determine whether the bar against multiple punishment under section 654 requires the sentence for count 6 to be stayed.

We now turn to Robles's remaining contentions.

*A. Sufficiency of the Evidence and Instructional Errors*

Robles asserts there was insufficient evidence to support his convictions in counts 3, 4 and 5 for assault with a firearm on Olmos, on Garcia and on her daughter because there is no evidence that he did an act with a firearm. Although he acknowledges that a possible explanation for the jury finding him guilty of these counts lies in the prosecutor's closing argument that he was acting in uniformity or in concert with the others, Robles claims such argument cannot provide support for his conviction because he was only charged as a direct perpetrator of the three assaults, with the jury being instructed solely under CALCRIM No. 875 (see p. 25, *ante*) as to the elements of assault with a firearm, and not instructed on aiding and abetting liability or in conjunction with an "in concert" allegation as to those counts. However, as the People correctly point out, the evidence showed that Robles was both a principal and an aider and abettor during the home invasion robbery and therefore was liable for the same crimes his accomplices, including Gudino, committed in addition to the natural and probable consequences of those crimes. (§ 31; *People v. Hill* (1998) 17 Cal.4th 800, 851.) Based on such aider and abettor theory of culpability, the evidence showed that Robles was also liable for the armed assaults

Gudino committed against Olmos, Garcia and her daughter. The problem is, as Robles and the People recognize, the trial court did not instruct the jury on aider and abettor liability, either alone or in conjunction with the "in concert" instruction it gave for the count 1 robbery enhancement.

It is well established that even in the absence of a request, the trial court must sua sponte instruct on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The general principles of law governing the case are those closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*Ibid*.) Because the People were clearly relying on an aiding and abetting theory of culpability for proving Robles guilty of the counts 3, 4 and 5 firearm assaults, and there was sufficient evidence in the record to support such theory of liability, the trial court clearly erred in failing to instruct sua sponte on aiding and abetting.

Further, as the People have conceded, the trial court also erred in failing to instruct on aiding and abetting with regard to the "in concert" instructions under CALCRIM No. 1601, which were given on the count 1 robbery in concert charge. The question then becomes whether the court's error in failing to instruct the jury on aiding and abetting in conjunction with that charge or with the assault charges was prejudicial error in this case.

A trial court's failure to instruct on an aiding and abetting theory, which includes the duty to instruct that an aider and abettor must have the intent to aid the perpetrator's crime as required by *People v. Beeman* (1984) 35 Cal.3d 547, 560, is federal constitutional error subject to *Chapman* harmless error analysis. (*People v. Prettyman*

(1996) 14 Cal.4th 248, 271.) The People argue that because there is no question the evidence showed Robles aided and abetted the robbery and assaults and CALCRIM No. 1601[6] given the jurors apprised them of the existence of aider and abettor liability, that such was sufficient to alert the jury to the concept of aider and abettor liability for which they could use the common sense meaning of those terms to find that Robles was an aider and abettor. The People posit that even if the trial court had provided the jury with a comprehensive instruction about aider and abettor liability, there can be no reasonable doubt that the jury would have reached the same verdicts.

Although we agree that on this record the error in failing to further define aiding and abetting with regard to CALCRIM No. 1601 was harmless with regard to count 1 because there was sufficient evidence to show that Robles personally committed a robbery by threatening at least to take Olmos's property and was voluntarily acting with two or more other people who were also committing the robbery in Garcia's home, thereby satisfying the statutory elements of the robbery in concert enhancement of section 213, subdivision (a)(1)(A), the same cannot be said for the assault counts.

As noted above, even though there may have been sufficient evidence before the jury to determine Robles was culpable as an aider and abettor to the three firearm assaults

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6 CALCRIM No. 1601, as read to the jury in this case, provided in pertinent part: "The defendants are charged in Count 1 with robbery by acting in concert. To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant personally committed or aided and abetted a robbery; [¶] 2. When he did so, the defendant voluntarily acted with two or more other persons -- people who also had committed or aided and abetted in the commission of a robbery; [¶] and [¶] 3. The robbery was committed in an inhabited dwelling."

committed by Gudino on the various victims, there were no jury instructions given to guide the jury in finding so. In fact, the jury interrupted its deliberations to send a note to the court asking, "[d]oes 'in concert' include all 6 charges." Although the court responded, with the agreement of counsel, that "[i]n concert applies to count 1 only," the jury's question should have alerted the court and parties to a very basic misunderstanding of how the jury was trying to establish liability for the other counts without aiding and abetting instructions.[7]

Under these circumstances, where the crucial element of intent of whether Robles aided and abetted Gudino in the firearm crimes was entirely omitted and we have no way of knowing whether the jury's verdicts on counts 3, 4 and 5 against Robles rested on the impermissible theory its question suggests it was considering for conviction, we cannot find the trial court's failure to instruct the jury on aiding and abetting liability harmless beyond a reasonable doubt. Consequently, we reverse Robles's count 3, 4 and 5 convictions.

In light of this determination, we need not address Robles's additional instructional error claim that the inclusion of the "force likely to product great bodily injury" language in CALCRIM No. 875 given to the jury was prejudicial error.

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[7] We can fully understand the jury's confusion in this regard as the prosecutor had argued in closing that all the crimes were done "in concert."

*B. Sentencing Issues*

Robles raises several sentencing issues in addition to those already discussed above. He asserts (1) the trial court should have stayed his sentence for the count 2 carjacking under section 654; (2) the court failed to recognize it had discretion to impose concurrent terms although he was a second strike defendant; (3) the court improperly imposed an upper term on count 1 in violation of *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*); and (4) the court failed to properly grant him his presentence behavioral custody credits. The People agree the court erred in failing to appreciate its discretion whether to impose consecutive or concurrent sentences under the three strikes law and in failing to award behavioral custody credits. The People also note that the court failed to impose or strike punishment for the prison prior enhancement it found Robles had suffered. The People ask that the matter be remanded for resentencing in light of the court's numerous errors. We agree and remand for resentencing. Although we vacate the sentences initially imposed, we briefly address Robles's assertions for guidance of the trial court on remand.

*1. Section 654 and the Count 2 Carjacking*

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Here the count 1 robbery in concert and the count 2 carjacking were both alleged to have been committed against the same victim, Olmos. He testified that Robles and the others took his car keys, car, wallet

and cell phones from him during the home invasion incident. Although Olmos also said the intruders initially asked for money and jewelry before ransacking the house for 45 minutes and then demanded the car keys during the end of that time, the sentencing judge merely imposed the count 2 carjacking consecutive to the count 1 robbery in concert because Robles was a second strike defendant without specifically ruling on Robles's section 654 concerns. Because we cannot tell from this record how the court would determine the divisibility of these offenses for purposes of resentencing in compliance with section 654, on remand, the sentencing judge should determine whether section 654 requires the count 2 carjacking to be stayed in light of imposing sentence on the count 1 robbery in concert.

*2. Concurrent Sentencing Discretion*

As the People correctly concede, the trial court erred when it failed to appreciate it had discretion under the three strikes law to impose concurrent or consecutive terms as between the multiple counts for which Robles, a second strike defendant was convicted, and for which he asked for concurrent sentencing. Consecutive terms would only be mandatory under section 667, subdivision (c)(6) and (7) if Robles's convictions were found " 'not [to be] committed on the same occasion, and [did] not aris[e] from the same set of operative facts.' " (*People v. Casper* (2004) 33 Cal.4th 38, 42; *People v. Hendrix* (1997) 16 Cal.4th 508, 513-514.) On remand, the sentencing judge should exercise its discretion to impose concurrent or consecutive terms for any counts following the principal term and state on the record its discretionary decision for doing so.

*3. Cunningham Upper Term*

At sentencing, Robles's counsel objected to factors listed by the probation officer in aggravation of Robles's sentence based on facts not found beyond a reasonable doubt by the jury under the holdings of *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Blakely v. Washington* (2004) 542 U.S. 296, and *Cunningham, supra,* 549 U.S. 270. Counsel noted, however, that Robles had admitted to several prior criminal convictions which he acknowledged were properly considered in aggravation under *Cunningham,* but argued it would be a dual use of facts to rely on them or his criminal history in this case to impose the upper term. The trial judge then used the fact that Robles was on parole at the time he had committed the home invasion robbery as the factor or reason to find the upper term appropriate for the count 1 principle term. Robles's objection on appeal to the imposition of such upper term is merely a restatement of his objection below.

Because the sentencing court's comments revealed it was looking at and relying upon Robles's criminal history, which falls under the "*Almendarez-Torres*[8] recidivism exception" to *Blakely/Cunningham* claims (see *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1514), its reliance on the fact that Robles was on parole at the time he committed the instant crimes was a proper reason to impose an upper term and is consistent with our Supreme Court's holdings in *People v. Towne* (2008) 44 Cal.4th 63, 76-81 and *People v. Black* (2007) 41 Cal.4th 799. Consequently, on remand, should the

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8 *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

trial court again impose an upper term based on Robles's criminal history or the fact that he was on parole, such would not be a basis for claiming *Blakely/Cunningham* error.

*4. Presentence Behavioral Custody Credits*

As the People correctly concede, Robles's contention the sentencing judge erred in refusing to grant him the behavioral credits the probation department had calculated he was due under section 2933.1 at the time of his sentence is meritorious. A review of the sentencing transcript reveals that the judge was under the mistaken impression that because of Robles's conviction for a violent felony the behavior credits under section 2933.1 would not commence until Robles physically entered the prison system. This was wrong. Although under section 2933.1, subdivisions (a) and (c), the presentence conduct credits of any person convicted of a violent felony offense listed in section 667.5, subdivision (c) is limited to 15 percent of the actual period of confinement in "a county jail . . . following arrest and prior to placement in the custody of the Director of Corrections" the trial court is required to award those limited credits to the defendant. Thus, on remand, the sentencing judge must calculate and award Robles his behavioral credits under section 2933.1, subdivisions (a) and (c).

*5. Prison Prior*

Although the trial court found true that Robles had suffered one prior prison term under section 667.5, subdivision (b) based on his convictions for robbery in 2003 and receiving stolen property in 2005, it did not mention the prior prison enhancement at sentencing. Because the court did not impose or strike the punishment for such true enhancement, it imposed an unauthorized sentence, which we would normally correct on

review. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Menius* (1994) 25 Cal.App.4th 1290, 1295; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.) However, because we cannot tell from this record how the court would exercise its discretion in such matter, especially in light of the prison prior enhancement being partially based on Robles's serious felony prior for which he must receive a five-year term (§ 667, subd. (a)(1); *Jones, supra*, 5 Cal.4th at pp. 1149-1153), the court must also exercise its discretion on remand regarding the prison prior enhancement.

In sum, although Robles's sentence is vacated and the entire matter remanded for resentencing, we express no opinion as to what sentence or discretionary decisions the trial judge should make on remand. We only require that the judge comply with the law and make knowing exercises of his discretion in light of our discussions above.

## DISPOSITION

Gudino's judgment is reversed. Robles's convictions for counts 3, 4, 5 and 7 are reversed. In all other respects, we affirm Robles's convictions. Robles's sentence is

vacated and the matter remanded for resentencing consistent with the directions expressed in this opinion.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.